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November 18. 2008

VIA HAND DELIVERY

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California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Strauss, et al. v. Horton, et al., Case No. S168047*
AMENDED Amicus Curiae Letter In Support of Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief

To the Honorable Justices of the California Supreme Court:

Submitted herewith is an Amended Amicus Curiae Letter In Support of the Strauss v. Horton Petition, which has been amended to add Laurence H. Tribe as an amicus curiae.

Respectfully Submitted,

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To the Honorable Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.500(g), amici curiae respectfully submit this **amended** letter in support of Petitioners in this original writ proceeding. Amici urge this Court to exercise its original jurisdiction, and to grant the relief sought by Petitioners.

Amici are professors of law who teach at law schools and/or are licensed to practice in the State of California. Amici list their titles and affiliations solely for identification purposes:

Christopher Edley, Jr., The Honorable William H. Orrick Jr. Distinguished Chair and Dean, Berkeley Law, University of California at Berkeley

Herma Hill Kay, Barbara Nachtrieb Armstrong Professor of Law and former Dean, Berkeley Law, University of California at Berkeley

Joan H. Hollinger, Lecturer In Residence, Berkeley Law, University of California at Berkeley

Laurence H. Tribe, Carl M. Loeb University Professor, Harvard Law School

Pamela S. Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law, and Co-Director of Supreme Court Litigation Clinic, Stanford Law School

Lawrence C. Marshall, Professor of Law, David and Stephanie Mills Director of Clinical Education and Associate Dean for Public Interest and Clinical Education, Stanford Law School

Kevin R. Johnson, Dean, Professor of Law and Chicana/o Studies, and Mabie-Apallas Public Interest Law Chair, UC Davis School of Law, University of California at Davis

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Shauna I. Marshall, Professor of Law and Academic Dean, University of California, Hastings College of the Law

Miye A. Goishi, Clinical Professor of Law and Director, Civil Justice Clinic, University of California, Hastings College of the Law

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Gerald P. Lopez, Professor of Law, University of California at Los Angeles, School of Law

Mary Dudziak, Judge Edward J. and Ruey L. Guirado Professor of Law, History and Political Science, University of Southern California Gould School of Law

STATEMENT OF INTEREST

Amici's teaching, scholarship, and other work have been in the areas of constitutional law, civil rights, or the protection of rights belonging to members of groups against whom discrimination is constitutionally suspect. Collectively, amici's work reflects a deep respect and concern for the principles of equal protection, particularly as they apply to members of groups discriminated against on the basis of a classification warranting high levels of constitutional scrutiny. Amici have played a role in the development of constitutional and civil rights jurisprudence, and have an interest in the continuing cohesive and sound development of those laws. Amici believe that their submission may aid the Court in assessing the petition now before it.

SUMMARY OF ARGUMENT

As the Court repeatedly has recognized, even relatively simple initiative enactments may substantially alter the underlying principles of the Constitution or our system of government.[1] Proposition 8 directly and facially targets members of a group that has been the subject of discrimination on the basis of a classification warranting strict constitutional scrutiny. It radically alters the California Constitution to mandate governmental discrimination against such a group with regard to one of the most valued, important, and personal of all fundamental rights – the right to marry the person of one's choice. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 813-820.)

The import of that alteration is unprecedented. If permitted to stand as an amendment, Proposition 8 would establish that voters may use the initiative process to decide that a group is no longer entitled to equal protection under the law, but instead that the government must discriminate against them on the basis of a suspect classification. The implications of that precedent would be devastating, for it would enshrine the concept that the majority may explicitly tyrannize the minority with relative ease and

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[1] (See, e.g., *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351-352; *Amador Valley J. Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223; *People v. Frierson* (1979) 25 Cal.3d 142, 186-187.)

meager deliberation. This undermines a bedrock constitutional concept and capsizes a core judicial function.

Over the last century, this Court has been called upon to review heated and undoubtedly heartfelt concerns about supposed societal harms posed by recognizing the equal dignity and equal rights of certain vulnerable members of society. Repeatedly, the Court has exercised its "most fundamental" power to analyze those concerns, to distinguish compelling need from irrational fear and prejudice, and to "preserve constitutional rights, whether of individual or minority, from obliteration by the majority." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 141.) The majority acting through initiative has never had, and still does not have, the power to obliterate the essential judicial function of enforcing the guarantee of equal protection of the laws, merely by amending the Constitution to abolish that guarantee for a particular group. Were it otherwise, the Court's quintessential role in protecting vulnerable minorities from arbitrary action would be negated, and there would be no significant check on the ability of a simple majority of voters to strip minorities of basic civil rights.

California voters wield broad authority to amend, but not revise the Constitution through the initiative process. The "amendment" challenged here radically redesigns a key component of constitutional structure. If it is truly the will of the people to overhaul such a central tenet of the California Constitution's Article I Declaration of Rights, the measure must undergo the more rigorous deliberative process created for constitutional revision. That process incorporates the power of the ballot box while guarding against the danger of "improvident or hasty" revision. (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 347.)

Consistent with "well settled principles," this Court should exercise its original jurisdiction in this matter. (*Raven*, *supra*, 52 Cal.3d at p. 340.) Proposition 8 unquestionably presents issues of "great public importance [that] should be resolved promptly." (*Id.*)

ARGUMENT

I. The Petition Presents An Issue of Great Public Interest That Must Be Resolved Promptly Through This Court's Original Jurisdiction.

The Court repeatedly has exercised its original jurisdiction when faced with questions regarding the validity of voter initiatives. As noted by this Court, "[i]t is uniformly agreed that the issues are of great public importance and should be resolved

promptly. Accordingly, under well-settled principles, it is appropriate that we exercise our original jurisdiction." (*Raven, supra*, 52 Cal.3d at p. 340, *citing Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 [original proceeding to review constitutional challenges to "The Victims' Bill of Rights" initiative] and *Amador Valley J. Union High School Dist. v. State Bd. of Equalization, supra*, 22 Cal.3d at p. 219 [original proceeding to review Proposition 13 property tax initiative.] See also *Legislature v. Deukmejian* (1983) 34 Cal.3d 658 [original petition for writ of mandate challenging redistricting initiative]; *American Federation of Labor-Congress of Industrial Organizations v. Eu* (1984) 36 Cal.3d 687 [original petition for writ of mandate challenging "Balanced Federal Budget Statutory Initiative"]; *Legislature v. Eu* (1991) 54 Cal.3d 492, 500 [exercising original jurisdiction to review "Political Reform Act of 1990" initiative]; *Senate v. Jones* (1999) 21 Cal.4th 1142 [original petition for writ of mandate challenging "Let The Voters Decide" initiative].)

In this case, the voter initiative in question presents even more pressing reasons for exercising original jurisdiction. If the Court does not make clear now that such a drastic change to the Constitution can only be made through a revision, it will harm not only the dignity and equality of lesbian and gay Californians, but that of any minority group that might be targeted in the future based on a suspect classification. In particular, if this Court does not resolve this issue promptly, similar measures targeting the equal protection rights of other minorities, or seeking to deny additional rights to lesbian and gay persons, may appear on the ballot as early as the next statewide election. And as both experience and social science research have shown, the harm caused by failing to enforce the limitations on substantial revisions to the underlying principles of our state Constitution ultimately would be felt by all Californians. Research indicates that "[v]oting on civil rights issues does not create a common understanding, but tends to erode a sense of community and damage the mental and physical health of vulnerable community members." With regard to measures targeting lesbian, gay, bisexual, and transgender ("LGBT") persons in particular, research has shown that "[in] places where LGBT rights have become the focus of political debate, once-friendly neighborhood networks were disrupted and fear and hostility became more commonplace in communities." (Russell, *The Dangers of a Same-Sex Marriage Referendum for Community and Individual Well-Being: A Summary of Research Findings* (2004) 7 Policy Journal of Institute for Gay and

Lesbian Strategic Studies 1.)[2]

For these reasons, there is even greater cause to invoke original jurisdiction. Sending the issue back to work its way through the trial and appellate courts would draw the matter out over a number of years. It would exacerbate the harms suffered by all affected communities.

II. Proposition 8's Fundamental Alteration Of The Preexisting Constitutional Framework Is A Revision, Not An Amendment.

The California Constitution provides two methods for changing its content: one for amendments, and one for broader or more profound revisions. Electors may amend the Constitution through the initiative process. (Cal. Const., art. XVIII, § 3.) By contrast, a revision of the Constitution may only be accomplished through the more formal and deliberative processes of legislative submission of the measure to the voters, (*id.*, § 1), or by convening a constitutional convention and obtaining popular ratification. (*Id.*, § 2.) (See *Raven, supra,* 52 Cal.3d at pp. 349-350; *Amador Valley*, *supra*, 22 Cal.3d at pp. 221-222; see also *McFadden*, *supra*, 32 Cal.2d at p. 347 ["The differentiation required [between 'amend' and 'revise'] is not merely between two words; more accurately it is between two procedures and between their respective fields of application. ... The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision."].)

Petitioners ably have set forth the governing standards regarding what constitutes an amendment as opposed to a revision. Amici do not expand upon that presentation. Amici simply note that, although the power of the California initiative is undeniably formidable,[3] it is expressly limited by the California Constitution, and cannot be used to

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[2] A copy of this article is available at http://www.iglss.org/media/files/Angles_71.pdf. The Institute for Gay and Lesbian Strategic Studies became a part of the Williams Institute at UCLA Law School in December 2006. (http://www.iglss.org.)

[3] (See, e.g., *Amador Valley*, *supra*, 22 Cal.3d at p. 229 [finding Proposition 13's tax reform was an amendment, and not a revision to California's Constitution]; *People v. Frierson* (1979) 25 Cal.3d 142, 186-187 [plurality opinion in context of individual criminal case arguing a "technical defect" four years after passage of the initiative that

bring about "revisional effect" that is "substantially beyond the system of checks and balances which heretofore has characterized our governmental plan." (*McFadden*, *supra*, 32 Cal.2d at pp. 343, 345-346, 348 [also noting certain provisions "would limit materially the functions of the courts of this state and would effect a substantial change in balance of governmental power."]; see also *Raven*, *supra*, 52 Cal.3d at pp. 351-352 [provision vesting California court's judicial interpretive power regarding fundamental criminal rights in the federal courts is a revision rather than an amendment, because "[i]n essence and practical effect," the shift of power is "devastating."].)

In finding that the provision at issue in *Raven* effected a revision, rather than an amendment of the Constitution, the Court paid particular heed to the measure's fundamental altering of *historic and unique judicial function*:

> Proposition 115 ... substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections. It directly contradicts the well-established jurisprudential principle that, "The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort ...." (*Nogues v. Douglass* (1858) 7 Cal. 65, 69-70; see also *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 176) [interpreting and applying the Constitution is "the very essence of judicial power"]; *Marin Water, etc. Co. v. Railroad Com.* (1916) 171 Cal. 706, 711-712.) In short, in the words of *Amador, supra*, this "relatively simple enactment [accomplishes] ... such far reaching changes in the nature of our basic governmental plan as to amount to a revision ...." (22 Cal.3d at 223; see also *Livermore v. Waite* (1894) 102 Cal. 113, 118-119 [revisions involve changes in the "underlying principles" on which the Constitution rests].)

(*Raven*, *supra*, 52 Cal.3d at pp. 354-355.) As shown below, Proposition 8 likewise alters historical and unique judicial function by eviscerating the Court's role as the last resort in adjudicating constitutional equal protection rights.

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reinstated the death penalty, finding that the initiative was an amendment, and not a revision, and noting the "broad powers of judicial review" retained by the court to "safeguard against arbitrary or disproportionate treatment."].)

III. In California's Constitutional Form of Government, Courts Hold the Central Judicial Function of Ensuring The Protection of Basic Civil Rights Against Arbitrary or Prejudicial Actions By The Majority.

As this Court recently has acknowledged, our governmental system places certain inalienable rights "beyond the reach of majorities" and entrusts the ultimate authority to interpret and enforce those rights to the courts:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights *may not be submitted to vote; they depend on the outcome of no elections.*

(*In re Marriage Cases*, *supra*, 43 Cal.4th at p. 852 [quoting *West Virginia State Bd. Of Education v. Barnette* (1943) 319 U.S. 624, 638, emphasis added]; see also *Lucas v. Forty-Fourth Gen. Assem. of State of Colo.* (1964) 377 U.S. 713, 736 [same].)

The judiciary's central role in preserving basic rights against arbitrary majoritarian rule is firmly embedded in the California Constitution:

> The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. (See Cal. Const., arts. IV, V and VI; The Federalist, Nos. 47, 48 (1788).) *Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority ...* Because of its independence and long tenure, the judiciary probably can exert a more enduring and equitable influence in safeguarding fundamental constitutional rights than the other two branches of government, which remain subject to the will of a contemporaneous and fluid majority.

(*Bixby*, *supra*, 4 Cal.3d at p. 141, internal citations omitted, emphasis added.) (See also *United States Steel Corp. v. Public Utilities Com.* (1981) 29 Cal.3d 603, 611-

612 ["The constitutional bedrock upon which all equal protection analysis rests is composed of the insistence upon a rational relationship between selected legislative ends and the means chosen to further or achieve them."].)

One of the core structural principles of our form of government guarantees that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of people choose that it be." (*Lucas*, *supra,* 377 U.S. at pp. 736-737.)

The guarantee against the divesting of individual civil rights by the majority is a bedrock constitutional concept. It is "too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority." (*Id.* at p. 737, fn. 30 [quoting *Lisco v. Love* (D.Colo. 1963) 219 F. Supp. 922, 944 (dis. opn. of Doyle, J.)].) This is because one of the purposes of the Constitution is to "protect minorities from the occasional tyranny of majorities. *No plebiscite can legalize an unjust discrimination.*" (*Hall v. St. Helena Parish School Bd.* (E.D. La. 1961) 197 F.Supp. 649, 659, affd., 368 U.S. 515 [quoted in part in *Lucas*, 377 U.S. 713, 736, fn. 29, emphasis added.]; cf. *Plyler v. Doe* (1982) 457 U.S. 202, 216 ["The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises."].)

Our constitutional form of government has long employed judicial deliberation as a brake or check on unjustified exercises of democratic power over protected rights:

> [T]he limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. *The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.*

(*Hurtado v. California* (1884) 110 U.S. 516, 536, emphasis added.)

To preserve our constitutional rights, the basic governmental plan delegates authority to the judiciary to "insist on knowing the relation between the classification adopted and the object to be attained," for it is the "search for the link between classification and objective [that] gives substance to the Equal Protection Clause; ... *By*

requiring that the classification bear [at least] a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." (*Romer v. Evans* (1996) 517 U.S. 620, 632-633, emphasis added.)

Proposition 8 effectively eliminates this critical judicial function from the equal protection equation, a responsibility that is at its height when a suspect classification is at issue. After this Court exercised its responsibility in *In Re Marriage Cases* to carefully scrutinize discriminatory laws, and determine whether they were supported by compelling need, Proposition 8 presented the electorate with the opportunity to "vote" on the entitlement of certain Californians to basic human rights.[4] But perhaps no principle is more essential to our democracy than that the majority may make no group an outsider to the Constitution. (See *Romer, supra*, 517 U.S. at p. 635 [voter referendum amending state Constitution to require unequal treatment of gay individuals improperly "deem[ed] a class of persons a stranger to its laws."].) If Proposition 8 is permitted to stand, the voters' elimination of equal protection for a group defined by a suspect classification would turn the Constitutional guarantee of equal protection of the laws into a hollow promise.

Unlike the initiative in *Frierson*, Proposition 8 does not simply limit an important right (in this instance, the right to marry the person of one's choice) for everyone. What makes this initiative wholly unprecedented is that it is *targeted at divesting fundamental rights from members of a single group – a group this Court has recognized is in need of the highest level of constitutional and judicial protection.* Proposition 8 is akin to a voter initiative that seeks to reinstate the death penalty, but only with respect to one protected group, i.e., African-Americans, or lesbians and gay men. Proposition 8 stands for the revolutionary concept that the initiative process may be used to nullify the historical judicial function of protecting members of vulnerable groups against the prejudices of the majority. In practical effect, it gives the electorate the power to override a Court's careful deliberation and analysis of compelling need, and substitute unchecked majoritarian will through the relatively non-deliberative initiative process.

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[4] By improperly putting the matter to voters who relied on campaign materials and other sources, Proposition 8 replaced the Court's careful analysis with "misleading claims about the current state of the law or about what Proposition 8 will do." (See Statement of 59 Constitutional Law Professors, viewable at http://www.noonprop8.com/downloads/MarriageStatement.Final.pdf.)

IV. The California Supreme Court Repeatedly Has Exercised Its Core Judicial Function To Protect Vulnerable Minorities, A Function That Would Be Severely Compromised If Proposition 8 Were Permitted To Stand.

This year the Court was called upon to exercise its fundamental judicial duty to analyze whether the laws of the State constitutionally could exclude a historically stigmatized minority from the right to marry someone of the same sex. (*In re Marriage Cases, supra,* 43 Cal.4th 757.) That decision is only the most recent in a historic line of cases in which the Court discharged "its gravest and most important responsibility under our constitutional form of government." (*Id.* at pp. 859-860 (conc. opn. of Kennard, J.).)

In each instance, often against a backdrop of significant controversy, the California Supreme Court exercised uniquely judicial authority to search for the link between classification and proffered objective, and to determine whether there was any justifiable basis for unequal treatment of protected classes under the law.

A. *Perez v. Sharp* (1948) 32 Cal.2d 711

Perez challenged the constitutionality of California's anti-miscegenation statute, which provided that "no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." (*Perez v. Sharp* (1948) 32 Cal.2d 711, 712.) The Court's role was to determine whether the law was "directed at a social evil and employ[ed] a reasonable means to prevent that evil," or whether the law was "discriminatory and irrational." (*Id.* at p. 713.) Among the justifications put forward and analyzed at length by the Court were concerns that: certain races were more prone than Caucasians to diseases such as tuberculosis (*id.* at p. 718); the amalgamation of races is unnatural (*id.* at p. 720); the progeny of mixed-race marriages are sickly, effeminate, inferior, and likely to be a burden on the community (*id.* at pp. 720, 724); certain races are physically, mentally, or socially inferior (*id.* at pp. 722-724, 727); persons wishing to marry in contravention of racial barriers come from the "dregs of society" (*id.* at p. 724); and the prevention of interracial marriage through the law would diminish racial tension in society and prevent the birth of children who might become social problems. (*Id.* at pp. 724-725; see also pp. 756-760 (dis. opn. of Shenk, J.).)

After addressing and analyzing each of the proffered reasons for the legislation, the majority of the *Perez* Court concluded that the law "impair[ed] the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups." (*Id.* at pp. 731-732.) The Court took the opportunity to identify the "circular reasoning" in popular attitudes that leads to racial prejudice:

> For many years progress was slow in the dissipation of the insecurity that haunts racial minorities, for there are many who believe that their own security depends on its maintenance. *Out of earnest belief, or out of irrational fears, they reason in a circle that such minorities are inferior in health, intelligence, and culture, and that this inferiority proves the need of the barriers of race prejudice.*

(*Id.* at p. 727, emphasis added.) The United States Supreme Court did not declare anti-miscegenation laws unconstitutional until nearly 20 years later in *Loving v. Virginia* (1967) 388 U.S. 1, at which point there were still 16 states that prohibited and punished marriages on the basis of racial classifications. (*Id.* at p. 6.)

B. *Fujii v. California* (1952) 38 Cal.2d 718

The California Alien Land Law essentially prohibited all aliens who were "ineligible for citizenship" from owning land, and provided that property purchased in violation of the law would escheat to the State of California. (*Fujii v. California* (1952) 38 Cal.2d 718, 720 & fn.1.) At the time of the decision, by virtue of the then-current federal immigration laws, the California Alien Land Law could only operate against people of Japanese descent, as well as a few other California residents of other races similarly prohibited from naturalizing. (*Id.* at pp. 729, 734.) Thus, as noted by the Court, although the statutory language classified persons on the basis of eligibility for citizenship, in reality the law classified persons on the basis of race or nationality. (*Id.* at p. 729.) Plaintiff Sei Fujii challenged the law as racially discriminatory against aliens in both purpose and effect. (*Id.* at p. 725.)

In defense of the statute's constitutionality, the State asserted that the purpose of the alien land law was to "restrict the use and ownership of land to persons who are loyal and have an interest in the welfare of the state." (*Id.* at p. 732.)[5] The Court examined the proffered purpose against the backdrop of the law's enactment. Voter pamphlets

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[5] This echoed arguments successfully made to the United States Supreme Court, which previously had upheld the Washington state alien land law, reasoning that "obviously" one who could not become a citizen "lacks an interest in, and the power to effectually work for the welfare of, the state." (*Terrace v. Thompson* (1923) 263 U.S. 197, 220-221, citation omitted.) *Terrace* also declaimed that "[t]he quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance...." (*Id.* at p. 221.)

described the law's "primary purpose" as "prohibit[ing] Orientals who cannot become Americans from controlling our rich agricultural lands," and urged that '"Orientals, largely Japanese, are fast securing control of the richest irrigated lands in the state', and that 'control of these rich lands means in time control of the products and control of the markets.'" (*Id.* at p. 735.)[6]

After analyzing the constitutional question presented, a majority of the Court held that "[t]he only disqualification urged against Sei Fujii is that of race, but it may be said of him ... '[that nothing] in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores – a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them.'" (*Id.* at pp. 733-734, citation omitted.)

C. *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1

The *Sail'er Inn* petitioners faced potential revocation of their on-sale liquor licenses because they employed women bartenders in violation of a statute prohibiting women from tending bar unless they were licensees, wives of licensees, or sole shareholders of a licensee corporation. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 6.) The Attorney General proffered three arguments to justify the statute's facial discrimination on the basis of gender. First, the State's attorney suggested "the Legislature may have concluded that a male bartender or owner must be present in a liquor establishment to preserve order and protect patrons, a function [the Attorney General] contends a woman could not perform." (*Id.* at p. 9.) Second, the State argued the statute was "designed to protect women since fewer women can be injured by inebriated customers if they are not permitted to work behind a bar." (*Id.*) Finally, the State offered that the law was intended to prevent "improprieties and immoral acts." (*Id.* at p. 10.)

The Court ultimately struck down the exclusionary statute on numerous grounds, including violation of the state and federal equal protection guarantees. The Court conducted its equal protection analysis, and found that women should be treated as a suspect classification. The Court noted that "Women, like Negroes, aliens, and the poor

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[6] The 1952 *Fujii* decision was issued in the wake of World War II, and the Japanese Internment. (See generally Yamamoto, Chon, Izumi, Kang & Wu, *Race, Rights and Reparation: Law and the Japanese American Internment* (2001).)

have historically labored under severe legal and social disabilities," then chronicled the historic supporting facts. (*Id.* at pp. 19-20.) The Court concluded that "Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment.... Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women." "The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." (*Id.* at pp. 10, 20.)

* * * * *

In each of the foregoing cases, the Supreme Court exercised its "gravest and most important responsibility" to sort through the arguments, apply the appropriate legal standards, and decide whether there was sufficient factual support for compelling need to justify the discriminatory laws. In each case, the Court carried out its responsibility against a societal backdrop that was hostile to the rights asserted by the protected group. In each instance, it fell upon the Court to carry out its unique judicial function to weigh the arguments and abide by appropriate legal standards, rather than popular sentiment. For, as recently noted by a legal scholar, "[u]npopular decisions are the price of constitutional rights."[7]

The passage of years has borne out that each decision was legally, morally, and socially just. Indeed, the concept of seeking justice under the law rather than bending to then-prevailing societal mores is built into our Constitution: "[T]he expansive and protective provisions of our constitutions ... were drafted with the knowledge that 'times

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[7] (Kermit Roosevelt, *California's same-sex marriage case affects all of us*, Christian Science Monitor (November 14, 2008), available at http://www.csmonitor.com/2008/1114/p09s01-coop.html.) Professor Roosevelt notes that "what's troubling for US citizens in the California [initiative] is the idea that an equality guarantee could not be effectively enforced against the will of a majority. The point of such a guarantee is precisely to protect minorities from discrimination at the hands of a majority... It makes sense to require supermajority support [through the revision process] to overrule a judicial decision that grants rights to a minority. It shows that the judges were so out of step with society that they were probably wrong. But a simple majority does not show that, and the constitution would not afford meaningful protection if it could be overruled at the will of the majority." (*Id.*)

can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.'" (*In re Marriage Cases*, *supra*, 43 Cal.4th 757, 854 [quoting *Lawrence v. Texas* (2003) 539 U.S. 558, 579.].)

Each of the three decisions represented an absolute and inviolate judicial determination as to the civil rights of the affected individuals. (See *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 474 [a judicial construction of a statute or constitutional provision is an authoritative statement of what the provision meant before as well as after the decision.].) Our constitutional system of government would not permit "amendments" to the Constitution through the initiative process that would usurp judicial authority, and deny equal treatment and equal dignity under the law to women and non-Whites by providing:

- "No marriage between members of different races shall be valid in the State of California;"
- "People of Japanese descent are prohibited from owning real property in the State of California;" or
- "The Legislature may enact laws barring women from certain occupations."

Yet, Proposition 8 embodies just such a change.

In *In re Marriage Cases*, this Court specifically invoked its historic legacy when it held that "just as this court recognized in *Perez* that it was not constitutionally permissible to continue to treat racial or ethnic minorities as inferior..., and in *Sail'er Inn* that it was not constitutionally acceptable to treat women as less capable than and unequal to men..., we now similarly recognize that an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights." (*In re Marriage Cases*, *supra*, 43 Cal.4th at pp. 822-823.)

Proposition 8 overrides the Court's substantial deliberation and constitutionally-grounded reasoning regarding equal access to marriage. It lays the groundwork for depriving minorities by simple amendment to the state's constitution from any right provided to the rest of society. It eradicates constitutional protection for members of a vulnerable class with respect to a fundamental right. This revolutionary concept is far beyond the boundaries of constitutional checks and balances, and cannot be viewed as a mere "amendment" to the Constitution.

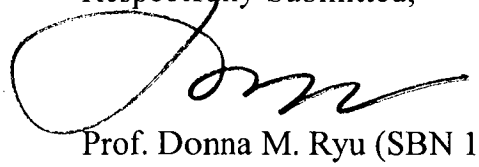
CONCLUSION

Under our Constitution, the judicial process is "the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." (*Hurtado v. California, supra*, 110 U.S. at p. 536.)

Proposition 8 strikes at the very heart of this most essential and indispensable judicial function, a function repeatedly used by this Court for the protective purpose for which it was intended. If allowed to stand, it would permit "the power of numbers," while "wielding the force of government," to transcend constitutional limits and dispossess susceptible minorities of their fundamental civil rights. It would create a dangerous and powerful precedent for the future abrogation of the rights of other vulnerable members of society.

As such, Proposition 8 is nothing short of a radical revision of our basic governmental plan. If permitted as an amendment, it would stand for the concept that a bare majority of electors have the power to declare that the very groups this Court has determined to require heightened protection under the equality guarantees of the California Constitution are, in fact, unequal. It would allow voters to reinstate the very discrimination from which such historically disadvantaged groups have been freed.

Respectfully Submitted,



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I, Bette Antor, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 425 Market Street, San Francisco, CA 94105-2482.

On November 18, 2008, I served the document:

AMENDED AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF, INCLUDING WRIT OF MANDATE AND REQUEST FOR IMMEDIATE INJUNCTIVE RELIEF

[ ] **BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service.

[ ] **BY PERSONAL SERVICE:** I caused the document(s) to be delivered by hand.

[X] **BY MAIL**: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

[ ] **BY FACSIMILE**: I transmitted such documents by facsimile

INTERESTED PARTIES:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on November 18, 2008, at San Francisco, California.

Bette Antor

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